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Asri bin Beddu v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05–23 OF 2011
RAMLY ALI, AZHAR MA'AH AND ABDUL AZIZ ABDUL RAHIM JJCA
17 MAY 2012

C

Criminal Law — Penal Code — s 302 — Murder — Appeal against conviction and sentence — Whether trial judge had erred in convicting accused in reliance on circumstantial evidence which did not point irresistibly to his guilt — Whether there was proper judicial appreciation of testimony of eyewitness — Whether appellate intervention necessary

D

Criminal Procedure — Defence — Intoxication — Application of — Whether trial judge had erred in his assessment of state of mind of accused who claimed to be under influence of alcohol — Whether defence available to accused

E

The murder of one Abdul Mobin bin Ibrahim ('the deceased') arose after an altercation between two groups of youths, namely the Suluks and the Bugis, who lived at a block of walk-up apartments ('the apartments') in Tuaran. While the deceased and a group of his Suluk friends, were talking in a hut near one of the apartment blocks, a group of about 10 Bugis youths, who were returning from a wedding reception, had stopped by the hut. According to one of the friends of the deceased ('PW5'), one of the Bugis youths (the accused), who appeared drunk and acted aggressively, had lifted his t-shirt to reveal what looked like a knife tucked at the waist of his trousers. PW5 had also heard the accused say 'if want to fight just stab' before his friends calmed him down and led him away. Thereafter the two groups had dispersed and made their way back to their respective homes. While making his way to his flat PW5 claimed he witnessed some of the Bugis youths chasing the deceased. When the deceased was about 60 feet in front of him, PW5 claimed he witnessed the accused, who was at that point in time in front of the deceased, punching the deceased in the chest and then running away. The deceased then turned and walked towards PW5. It was then that PW5 saw the bloodstain on the deceased's shirt and realised that the deceased had been stabbed on the upper part of his abdomen. The deceased collapsed and was sent to Tuaran hospital but was pronounced dead on arrival. The 16-year old accused was arrested and charged with murder under s 302 of the Penal Code. The evidence from the post-mortem of the deceased established that the stab wound caused the death of the deceased. Although PW5 testified that he did not see the deceased being stabbed by the accused, he identified the accused as the person responsible for

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the stabbing based on what he had witnessed. The accused testified that he was drunk and did not know what had happened that night. According to the accused a quarrel had ensued between the Suluk youths and his Bugis friends when they passed by the hut near the apartment block. The accused further claimed that when one of the Suluk youths tried to attack him, he had brandished the knife he was carrying at him to scare the youths away but he did not know whether the knife had hit anyone. He said he had then run home and that when he arrived home, his sister had seized the knife from him. The evidence established that the bloodstains on the knife belonged to the deceased, thereby establishing that the deceased was stabbed with the knife. Based on the evidence the trial judge found that the accused was responsible for the injuries suffered by the deceased, which caused his death. The accused who was 17 at the time when the trial commenced was found guilty and convicted of the offence of murder. The accused was sentenced to a detention in prison during the pleasure of the Yang Dipertua Negeri Sabah. This was his appeal against that conviction and sentence. The accused submitted that the evidence was only circumstantial and that the deceased could have been stabbed by any one of the Bugis youths who were chasing him; that due to his state of intoxication he was incapable of knowing that what he was doing was wrong; that PW5 was not a credible witness and there had been no corroboration of his evidence.

Held, dismissing the appeal and affirming the conviction and sentence imposed by the High Court:

(1) The trial judge had addressed the defence of intoxication and found that the accused had failed to prove the defence on a balance of probabilities. After having meticulously perused the notes of proceedings and having considered the authorities it was clear that the trial judge was correct in law and the approach he had taken in assessing the evidence as to the intoxication of the accused. In the present appeal, there was evidence of the accused having consumed alcohol before the wedding reception but no evidence as to whether he had consumed some more alcohol at the reception. The assessment of the state of mind of the accused who claimed to be under the influence of alcohol at the time of committing the alleged wrong was necessary to establish whether he had formed the intention to commit such an act. The trial judge in this case had made this assessment by looking at the conduct of the accused prior to and after the incident and concluded that the evidence had not established that the accused was so intoxicated that he did not know what he did was wrong. Further, the trial judge's assessment of the conduct of the accused as to the extent of his intoxication was well supported by the evidence of PW5. Hence there was no fault in the trial judge's analysis of the evidence on the issue of intoxication and there was no need for appellate intervention (see paras 33–34).

(2) The evidence of PW5 was not circumstantial but in fact that of an

eyewitness. The prosecution had also adduced evidence that the knife recovered from the accused's flat when he was arrested was the weapon used to stab the deceased. It is well settled law that the cumulative effect of such evidence must lead to the irresistible conclusion that it was the accused who committed the crime. The mere fact that PW5 did not see the blade of the knife being thrust into the chest of the deceased by the accused did not create any reasonable doubt in the prosecution case as to the identity of the accused as the person who had stabbed the deceased (see paras 41–43).

(3) There was no necessity for any corroboration of the testimony of PW5. There had been a proper judicial appreciation of the evidence given by PW5 (see para 44).

[Bahasa Malaysia summary

Pembunuhan Abdul Mobin bin Ibrahim ('si mati') berlaku selepas perbalahan antara dua kumpulan remaja, iaitu kumpulan Suluk dan kumpulan Bugis, yang tinggal di blok apartmen-apartmen tanpa lif ('apartmen tersebut') di Tuaran. Pada masa si mati dan sekumpulan kawan Suluknya sedang berborak di pondok berdekatan salah satu blok apartmen tersebut, sekumpulan lebih kurang 10 orang remaja Bugis yang baru pulang daripada majlis perkahwinan telah berhenti di pondok itu. Menurut salah seorang daripada kawan si mati ('PW5'), salah seorang daripada remaja Bugis itu ('tertuduh'), yang kelihatan mabuk dan bersikap agresif, telah mengangkat kemejanya untuk menunjukkan apa yang kelihatan seperti pisau yang diselit di bahagian pinggang seluarnya. PW5 juga terdengar tertuduh berkata 'if want to fight just stab' sebelum kawan-kawannya menenangkannya dan membawanya pergi dari situ. Berikutan itu dua kumpulan itu telah bersurai dan menuju pulang ke arah rumah masing-masing. Sewaktu berjalan pulang ke flatnya PW5 mendakwa dia telah menyaksikan beberapa remaja Bugis mengejar si mati. Apabila si mati berada kira-kira 60 kaki di depannya, PW5 mendakwa tertuduh, yang pada masa itu berada di hadapan si mati, telah menumbuk si mati di bahagian dada dan kemudian melarikan diri. Si mati kemudian berpaling dan berjalan ke arah PW5. Pada masa itulah PW5 melihat kesan darah di kemeja si mati dan menyedari bahawa si mati telah ditikam di bahagian atas perutnya. Si mati rebah dan dibawa ke hospital Tuaran tetapi diisytiharkan mati apabila tiba di situ. Tertuduh yang berumur 26 tahun telah ditangkap dan dituduh membunuh di bawah s 302 Kanun Keseksaan. Keterangan daripada post-mortem si mati membuktikan bahawa luka tikaman itu telah menyebabkan kematian si mati. Walaupun PW5 memberi keterangan bahawa dia tidak melihat si mati ditikam oleh tertuduh, dia telah mengenalpasti tertuduh sebagai orang yang bertanggungjawab untuk tikaman itu berdasarkan apa yang disaksikannya. Tertuduh memberi keterangan bahawa dia mabuk dan tidak mengetahui apa yang berlaku pada malam itu. Menurut tertuduh satu perbalahan berlaku antara remaja Suluk dan kawan-kawan Bugisnya semasa

mereka lalu di pondok berdekatan blok apartmen tersebut. Tertuduh selanjutnya mendakwa bahawa apabila salah seorang daripada remaja Suluk cuba menyerangnya, dia telah mengacukan pisau yang dibawanya kepadanya untuk menakutkan remaja itu supaya pergi tetapi dia tidak tahu sama ada pisau itu terkena sesiapa. Dia menyatakan dia kemudian berlari pulang dan apabila tiba di rumah, kakaknya merampas pisau itu daripadanya. Keterangan membuktikan bahawa kesan darah pada pisau itu milik si mati, yang membuktikan bahawa si mati telah ditikam dengan pisau itu. Berdasarkan keterangan itu hakim bicara mendapati bahawa tertuduh bertanggungjawab untuk kecederaan yang dialami oleh si mati, yang telah mengakibatkan kematiannya. Tertuduh berumur 17 tahun pada masa perbicaraan dimulakan telah didapati bersalah dan disabitkan kesalahan membunuh. Tertuduh telah dihukum agar ditahan di penjara atas perkenan Yang Dipertua Negeri Sabah. Ini adalah rayuannya terhadap sabitan dan hukuman itu. Tertuduh berhujah bahawa keterangan itu hanya mengikut keadaan dan bahawa si mati mungkin telah ditikam oleh mana-mana daripada remaja Bugis yang mengejarnya; bahawa akibat daripada keadaan mabuknya dia tidak mengetahui apa yang dilakukannya adalah salah; bahawa PW5 bukan saksi yang boleh dipercayai dan tiada sokongan terhadap keterangannya.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman yang dikenakan oleh Mahkamah Tinggi:

(1) Hakim bicara telah mengutarakan pembelaan mabuk dan mendapati bahawa tertuduh telah gagal membuktikan pembelaan itu atas imbangan kebarangkalian. Setelah meneliti nota prosiding dan mengambil kira autoriti-autoriti maka adalah jelas bahawa hakim bicara adalah betul dari segi undang-undang dan pendekatan yang diambil beliau dalam menilai keterangan berhubung keadaan mabuk tertuduh. Dalam rayuan ini, terdapat keterangan tertuduh mengambil minuman keras sebelum majlis perkahwinan tetapi tiada keterangan berhubung sama ada dia telah minum lagi di majlis itu. Penilaian keadaan minda tertuduh yang mendakwa di bawah pengaruh alkohol pada masa melakukan kesalahan yang dikatakan itu adalah perlu untuk membuktikan sama ada dia mempunyai niat untuk melakukan perbuatan itu. Hakim bicara dalam kes ini telah membuat penilaian ini dengan melihat kepada perilaku tertuduh sebelum dan selepas kejadian dan memutuskan bahawa keterangan tidak membuktikan bahawa tertuduh terlalu mabuk sehingga dia tidak mengetahui apa yang dilakukan adalah salah. Selanjutnya, penilaian perilaku tertuduh oleh hakim bicara berhubung keadaan mabuknya disokong oleh keterangan PW5. Justeru analisa hakim bicara tiada cacat cela berhubung keterangan tentang isu mabuk dan tidak perlu ada campur tangan pihak rayuan (lihat perenggan 33–34).

(2) Keterangan PW5 tidak mengikut keadaan tetapi pada hakikatnya saksi utama. Pendakwaan juga telah mengemukakan keterangan bahawa pisau

yang ditemui di flat tertuduh semasa dia ditangkap adalah senjata yang digunakan untuk menikam si mati. Adalah undang-undang tetap bahawa kesan kumulatif keterangan sebegini pasti membawa kepada kesimpulan yang tidak dapat disangkal bahawa tertuduh yang telah melakukan jenayah itu. Fakta bahawa PW5 tidak melihat bilah pisau itu menikam dada si mati oleh tertuduh tidak membentuk apa-apa keraguan munasabah dalam kes pendakwaan untuk mengenalpasti tertuduh sebagai orang yang menikam si mati (lihat perenggan 41–43).

(3) Tiada keperluan untuk apa-apa sokongan berhubung keterangan PW5. Terdapat penghayatan kehakiman yang wajar terhadap keterangan yang diberikan oleh PW5 (lihat perenggan 44).]

Notes

For cases on intoxication, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1931–1933.

For cases on s 302, see 4(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1815–1931.

Cases referred to

Balasingam v PP [1959] 1 MLJ 193 (folld)

Chan Kwee Fong v PP [2010] 1 MLJ 441; [2010] 3 CLJ 671, CA (refd)

Francis Antonysamy v PP [2005] 3 MLJ 389; [2005] 2 AMR 750; [2005] 2 CLJ 481, FC (refd)

Kenneth Fook Mun Lee v PP [2007] 2 MLJ 130; [2006] 4 CLJ 359, FC (refd)

Kumaran a/l Sappani v PP [2012] 6 MLJ 153; [2012] 6 MLRA 351, FC (refd)

Kumaran a/l Sappani v PP [2010] 2 MLJ 771; [2012] 6 MLRA 390, CA (refd)

Mohd Abbas bin Danus Baksan v PP [2006] 5 MLJ 332; [2006] 3 CLJ 880, CA (refd)

Muniandy & Ors v PP [1966] 1 MLJ 257, FC (refd)

Murugapillai a/l Rengasamy v PP [2011] 5 MLJ 730; [2010] 5 CLJ 563, CA (refd)

PP v Awang Raduan bin Awang Bol [2006] 1 MLJ 332; [2005] 1 CLJ 649, FC (refd)

PP v Kumaran Kunchi Raman [2008] MLJU 926; [2010] 3 CLJ 220, HC (refd)

Sunny Ang v PP [1966] 2 MLJ 195, FC (refd)

Legislation referred to

Child Act 2001 s 97(2)

Evidence Act 1950 s 105

Penal Code ss 85, 85(i), (ii)(a), (b), 86, 300(b), (c), (d), 302

Watti bin Junius (Junius Vung & Co) for the appellant.

Mohamad Abazafree bin Mohd Abbas (PG Cyril a/l PG Chandrada with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Aziz Abdul Rahim JCA:

INTRODUCTION

[1] The appellant was charged under s 302 of the Penal Code for the murder of one Abdul Mobin bin Ibrahim ('the deceased'). At the time when he was charged the appellant was a minor — he was just 16 years old when he was arrested on 12 October 2009; and he was 17 years at the time when the trial commenced on 27 September 2010.

[2] After a full trial, the trial judge found the appellant guilty and recorded a conviction against the appellant for the offence and sentenced him to a detention in a prison during the pleasure of the Yang Dipertua Negeri Sabah in accordance with s 97(2) of the Child Act 2001. The trial was conducted without assessors.

[3] This is the appellant's appeal against that conviction and sentence. For the purpose of this appeal the appellant will be referred to as the 'accused'.

BRIEF FACTS

[4] The accused, Mundzirin bin Ahmad ('PW5') and the deceased lived at Taman Telipok Ria, Phase II, Tuaran, which are blocks of walk-up apartments ('the apartments'). On 11 October 2009 at about 10pm the deceased was talking with four of his friends at a hut near to Block 18 of the apartments. One of the friends was PW5. A few minutes later a group of about 30 youths came by and stopped at the hut on their way back to the apartments at Block 3 and Block 4. One of the youths was identified by PW5 as Asri bin Beddu ('the accused') who was wearing a green t-shirt and black long trousers. At the hut the accused lifted his shirt slightly in front of the deceased, PW5 and the three other friends of the deceased.

[5] PW5 said he saw something was tucked at the waist of the trousers of the accused. He suspected it was a knife because what he saw looked like the handle of a knife. According to PW5, the accused acted aggressively and appeared either to be drunk or was confused. PW5 heard the accused said 'if want to fight, just stab'. The accused's friends tried to calm him down and then they all left the hut. The accused and the youths continued their journey to their respective blocks, using the concrete walkway on the outside of Block 18. The deceased then also walked back to his apartment and followed the youths from behind. The deceased used the corridor inside the blocks. PW5 followed and walked behind the deceased.

[6] PW5 lived at apartment 18-G-06 of Block 18. When PW5 was outside of his apartment, he saw the deceased had reached the end of Block 18 and turning towards another block. He then saw some of the youths were chasing the deceased who was running back towards the corridor inside Block 18. PW5 turned back to the corridor and he saw that the deceased was about 60 feet in front of him, at the end of Block 18.

[7] At that point in time, PW5 saw the accused approaching the deceased and the accused moved as if he was punching the deceased on the chest and the accused then ran away. The deceased then turned and walked towards PW5. PW5 saw there was bloodstain on the deceased's shirt. The deceased told PW5 that he had been stabbed, without saying who had stabbed him. The deceased then showed to PW5 the upper part of his abdomen where he had been stabbed. The deceased then collapsed and was sent to Tuaran, but he was pronounced dead on arrival.

[8] The accused was arrested the next day at his apartment. A knife (exh P14) which was kept inside a purple-colored suitcase (exh P25) in a room inside the apartment was recovered and seized by the police on information given by the accused's sister Asma bt Beddu ('PW11'). The accused's green t-shirt was also recovered from behind a washing machine and his black trouser were recovered from a sink in the apartment. The knife, green t-shirt and black trousers were later sent to the chemist for DNA analysis.

[9] The evidence from the post-mortem of the deceased established that the deceased died from the stab wound. The post-mortem was conducted by Dr Jessie Hiu ('PW1') and the deceased was identified by his father Encik Ibrahim Safari ('PW2') at the post-mortem.

[10] The evidence established that the stab wound to the deceased's chest had injured the deceased's liver, lesser omentum, pancreas, superior mesenteric artery and splenic vein resulting in severe bleeding which led to hypovolaemic shock and death. PW1 testified that the stab wound was 18cm deep and was sufficient in the ordinary course of nature to cause the death of the deceased.

[11] PW5 had identified the accused as the person who was responsible for the stabbing. PW5 said that he did not actually see the accused stabbing the deceased in the chest with a knife because the deceased was then facing the accused and the deceased had his back towards PW5. What he saw was the accused approaching the deceased and moved his body and hands as if the accused was punching the deceased on the chest. The accused then ran away.

THE DEFENCE CASE

[12] The accused elected to give evidence under oath. The accused is a Bugis.

The accused had testified in his defence that he was drunk and did not know what happened that night. However learned counsel for the accused did not submit on the defence of intoxication.

[13] The accused testified that on the night of the incident he had consumed alcohol with ten of his Bugis's friends and then they went to a wedding reception. After the reception, they went home. On the way home, they passed by a hut near to Block 18 of the apartments where they met some Suluk youths. He said a quarrel ensued between the two groups. He said his friends moved forward to fight and he followed from behind. He said one of the Suluk youths tried to attack him. At the time he was carrying a knife and he brandished the knife in order to scare the youths. He said he then ran home and met his sister at home who seized the knife from him.

[14] The accused said when he was brandishing the knife at the Suluk youths he did now know if it hit any of them. When he was brandishing the knife, there was only one Suluk youth in front of him.

[15] The accused said that he did not know the deceased and he did not recognise the Suluk youths who were at the hut. The accused was not sure whether he had murdered Abdul Mobin or not because he was drunk on that night and he did not know if the knife hit anyone or not.

[16] The DNA analysis of the bloodstains on the green t-shirt worn by the accused that night established that it did not belong to the deceased. Thus, it was submitted that if the accused had stabbed the deceased then the deceased's blood should have been on the green t-shirt. Learned counsel also submitted that the deceased could have been stabbed by one of the ten youths who were chasing him and not by the accused.

FINDINGS OF THE HIGH COURT

[17] The trial judge found that the deceased had died as a result of injuries sustained by him on that night between 11pm and 11.08pm.

[18] The trial judge also found that although PW5 did not actually see the accused stabbed the deceased, he did see the accused moved towards the deceased as if to punch the deceased in the chest. As soon as the accused ran away and the deceased turned and walked towards him, PW5 saw bloodstain on the deceased's white shirt. The deceased then told PW5 that he had been stabbed and the deceased showed to PW5 the upper part of his abdomen which had been stabbed. The deceased's words that he had been stabbed and showing

to PW5 the upper part of his abdomen where he had been stabbed corroborated what PW5 had said that he saw the accused moved as if to punch the deceased in the chest.

[19] The evidence established that the accused was responsible for the injuries suffered by the deceased and which injuries caused his death. From the evidence there was no doubt that the accused inflicted and caused the injuries to the deceased with the intention of causing the bodily injuries to the deceased as the accused knew to be likely to cause death or with the intention of causing bodily injuries and such bodily injuries were sufficient in the ordinary cause of nature to cause death or with the knowledge that the act carried out by him was so imminently dangerous that it must in all probability cause death, or such injuries as were likely to cause death, and committed such an act without any excuse for incurring the risk of causing death or such injuries as aforesaid within the meaning of s 300(b), (c) or (d) of the Penal Code.

[20] The learned judge also found that the accused was armed with a knife that night and the knife was given to him by his friend Utang while they were drinking, before they went to the wedding reception. The accused had possession of the knife since then until he arrived home when it was taken from him by his sister. The bloodstains on the knife belonged to the deceased, establishing that the deceased was stabbed with the knife.

GROUNDS OF APPEAL

[21] In his petition of appeal dated 12 April 2012, the accused raised eight grounds of appeal. However these eight grounds may be grouped into three main grounds. Firstly, grounds (1)–(2) may be grouped as one in that the accused complained that the evidence that it was the accused that stabbed the deceased is only circumstantial. The accused said in his petition that on the evidence there is a doubt that the accused could have already been stabbed by one of the youths who chased the deceased. Secondly, grounds (3)–(7) may be taken together as the second ground of appeal in that the accused said at the material time when the stabbing occurred he was drunk and in the state of drunkenness and therefore incapable of knowing what he was doing was wrong. Thirdly, ground (8) may be taken on its own in that the accused claimed that the PW5 is not a credible witness and there is no corroboration of his evidence.

THIS APPEAL

[22] In arguing this appeal before us, learned counsel for the accused did not forcefully argued the first and third grounds as to the circumstantial evidence of the stabbing and the credibility of PW5 respectively. Instead learned counsel's

arguments focused mainly on the second ground that is the state of drunkenness of the accused at the time of the incident. We will therefore address this second ground first and will address the first and third ground of appeal in the later part of this judgment.

[23] With regard to the second ground of appeal, the accused testified that on the night in question he had consumed alcohol with ten of his Bugis friends and then they went to a wedding reception. After the wedding reception the accused testified that he went home with one of his friends by the name of Amang. He did not know what happened to the other nine of his friends who were with him earlier. On the way the accused stopped by a hut near Block 18 apartments Taman Telipok Ria Phase II Tuaran Sabah. There he met a group of Suluk's youth. They had a quarrel. The accused testified in examination-in-chief (p 181 of the appeal record) that when one of the Suluk's youths tried to attack him, he (ie the accused) brandished the knife that he had on him to scare the youths and then he ran home. In examination-in-chief the accused testified that he could not remember how many Suluk youths were there at the hut near Block 18 apartments. He also told his learned counsel in a question put to him during examination-in-chief that he was too drunk on the night of the incident that he could not remember lot of things. The accused also testified (at p 191 of the appeal record) that he was not sure whether he had murdered Abdul Moin (the deceased) or not because he was drunk that night and he did not know if knife had hit anyone or not. Thus the primary defence relied on by the accused is intoxication.

[24] Intoxication as a defence to any criminal charge is provided for under ss 85 and 86 of the Penal Code; and the burden to show whether this defence is available to the accused is on the accused himself as provided under s 105 of the Evidence Act 1950. For ease of reference the three sections are produce below.

[25] Sections 85 and 86 of the Penal Code:

> Intoxication when a defence
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> 85. (1) Save as provided in this section and in section 86, intoxication shall not constitute a defence to any criminal charge.
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> (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know what that such act or omission was wrong or did not know what he was doing and -
>
> (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
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> (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
>
> Effect of defence of intoxication when established

86. (1) Where the defence under subsection 85(2) is established, then in a case falling under paragraph (a) thereof the accused person shall be acquitted, and in a case falling under paragraph (b), the provisions of section 84 of this Code, sections 347 and section 348 of the Criminal Procedure Code [Act 593] shall apply.

(2) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(3) For the purpose of this and the preceding section 'intoxication' shall be deemed to include a state produced by narcotics or drugs.

[26] Section 105 of the Evidence Act 1950:

Burden of proving that case of accused comes within exceptions

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances.

ILLUSTRATIONS

(a) A accused of murder alleges that by reason of unsoundness of mind he did not know the nature of the act.

The burden of proof is on A.

(b) A accused of murder alleges that by grave and sudden provocation he was deprived of the power of self control.

The burden of proof is on A.

(c) Section 325 of the Penal Code provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section 325.

The burden of proving the circumstances, bringing the case under section 335, lies on A.

[27] However as a general rule, intoxication is not a defence to a criminal charge. This is plain from the reading of s 85(i) of the Penal Code. It is only a defence if the accused can bring the defence of intoxication within the exception.

[28] If the defence of intoxication is successful then the accused is entitled to an acquittal. To succeed in this defence the accused must show, under s 85(ii)(a), that at the time of the act or omission complained of he did not

know that such act or omission was wrong or he did not know what he was doing. The accused must also show that the state of intoxication was caused without his consent by the malicious or negligent act of another person. Alternatively, under s 85(ii)(b) the accused may show that by reason of the intoxication he was insane, either temporarily or otherwise, at the time of such act or omission. In the present appeal however we are only concern with s 85(ii)(a).

[29] Case law has established firmly that the burden to be discharged by the accused under s 85 to bring the defence of intoxication within the exception is on the balance of probabilities — see *Murugapillai a/l Rengasamy v Public Prosecutor* [2011] 5 MLJ 730; [2010] 5 CLJ 563 (CA), *Chan Kwee Fong v Public Prosecutor* [2010] 1 MLJ 441; [2010] 3 CLJ 671 (CA); *Public Prosecutor v Kumaran Kunchi Raman* [2008] MLJU 926; [2010] 3 CLJ 220; *Kenneth Fook Mun Lee v Public Prosecutor* [2007] 2 MLJ 130; [2006] 4 CLJ 359.

[30] The learned trial judge had addressed this defence in his written judgment (at pp 231–232 of the appeal record) even though learned counsel assigned to the defence of the accused in the trial at the High Court did not submit on this defence because the accused had testified that he was drunk and did not know what happened on the night of the incident. In his judgment the learned judge found that the accused had failed to prove the defence of intoxication on a balance of probabilities. This is what the learned judge said in paras 30–31 of his judgment at pp 231–232 of the appeal record:

> 30. In order to determine whether the accused was, by reason of intoxication, rendered temporarily insane at the time he stabbed the deceased such that he could not have formed the intention to cause those bodily injuries, the conduct of the accused prior to, during and after the commission of the offence would be relevant: *Chan Kwee Fong v Public Prosecutor*. Although the accused said he was drunk and there was evidence that he vomited after he got home, there was no evidence led as to the amount of alcohol consumed by him. The fact that he vomited was no indication of the amount of alcohol he had consumed nor whether it affected his judgment as to what was right or wrong or that he did not know what he was doing that night. Some people have little or less tolerance for alcohol while others have higher tolerance for it. After the accused was arrested, his blood and urine samples were taken for toxicology tests. The tests did not disclose any alcohol.
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> 31. From the hut, the accused was able to walk normally back to his house. He was able to climb the stairs to the top floor of the apartment where his sister found him. He was able to walk with his sister back to their apartment and answered questions from his sister. The evidence did not establish that he was so intoxicated that he did not know what he was doing or that he did not know what he did was wrong. The accused had failed to prove the defence of intoxication on a balance of probabilities.

[31] Is the learned judge right in his conclusion and judicial assessment of

the evidence? Learned counsel for the accused contended in his submission that the learned judge was wrong in accepting the evidence of PW8 the chemist and the chemist's report exh P30 which concluded that upon conducting toxicological test on the blood sample taken from the accused, there was no trace of alcohol in the accused's blood system although PW5 in his testimony (at p 58 of the appeal record *Jilid* I) had said that 'the person wearing the green t-shirt and long black trousers (*referring to the accuse*d) stood in front of us and he was in the state of drunk or confused'. (Emphasis added.)

[32] Having perused the notes of proceedings in this case meticulously and having considered the authorities, we are of the view that the learned judge was correct in law and facts to reject the defence of intoxication raised by the accused in this case. In *Chan Kwee Fong v Public Prosecutor* the Court of Appeal had said that '… whether the defence of intoxication had been successfully raised, we have to look at the conduct of the accused immediately prior to and after the commission of the offence …'. In an earlier case, the Federal Court in *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389; [2005] 2 CLJ 481 had said that the issue in a defence of intoxication is the state of the mind of the accused because this will determine whether the accused had formed the necessary intention to commit the offence. On this point the Federal Court had this to say:

> The best evidence to establish his state of mind is his conduct prior to, at the time of, and after the offence as different people react differently to the same blood alcohol level (p 413 (MLJ); p 509 (CLJ) of the law report).

[33] Reading the learned trial judge's judgment on this issue in the present case, we could see that he has taken this approach in assessing the evidence as to the intoxication of the accused. At this juncture it is pertinent to observe that the accused consumed alcohol before he went to the wedding reception; and there is neither evidence to say how long he was at the wedding reception nor there is evidence whether he had consumed some more alcohol at the wedding reception before he went home. In the circumstance is it not possible that the effect of the alcohol (taken earlier and before the wedding reception) in the blood system of accused could have worn off and waned by the time the accused left the wedding reception for home? It is also worth noting that during examination-in-chief the accused could remember in detail most of the things that happened on the night of the incident except as to the number of Suluk youths that were at the hut.

[34] The learned trial judge also had noted in his judgment that the accused gave evidence that he vomited when he got home. However the learned judge was not impressed. To the learned judge the fact that the accused vomited was no indication of the amount of alcohol he had consumed or the level of the

alcohol in his system to affect the accused judgment so as to render the accused incapable of not knowing what was right or wrong or what he was doing that fateful night. The learned trial judge also had considered the challenge by the defence as to the reliability of the toxicology test result that shows no presence of alcohol in the accused's blood system.

[35] Learned counsel for the accused argued that the evidence of the blood and urine samples of the accused that were taken for toxicology tests at the chemistry department had shown negative result in that the test did not disclose the presence of traces of alcohol in the accused's system because the tests were done several hours after the samples were taken from the accused thus rendered the test result unreliable. On this point we agree with the submission of the learned deputy prosecutor that the challenge by the defence as to the accuracy or validity of the toxicology test result is a challenge on a scientific findings by an expert that is the chemist ('PW8'). Perusal of the appeal records shows that PW8 the chemist had done all the analysis of the exhibits sent to the Chemistry Department in this case except for the toxicology test which was done by another chemist Dickens Wong Vui Foo at the request of PW8. The chemist Dickens Wong Vui Foo had prepared his duly signed report on his toxicology test (as exhibited at p 327 of the appeal record *Jilid* II) and had given them to PW8 who then incorporated the report in the main report by the chemist in exh P30 (at p 298 of the appeal record *Jilid* II) signed by PW8. Therefore it is incumbent on the accused to produce rebuttal evidence by another expert to discredit such findings. However this was not done and therefore the learned judge was right to accept the evidence of the toxicology test by the chemist as conclusive.

[36] The assessment of the state of mind of an accused who claimed to be under the influence of alcohol or drunk at the time of committing the alleged wrongful act is necessary to establish whether he had formed the intention to commit such an act. The learned trial judge in this case had made this assessment by looking at the conduct of the accused prior to and after the incident and concluded that the evidence did not established that the accused was so intoxicated that he did not know what he was doing or that he did not know what he did was wrong. This is what the learned judge said at para 31 of his judgment (p 232 of the appeal record *Jilid* II):

> 31. From the hut, the accused was able to walk normally back to his house. He was able to climb the stairs to the top floor of the apartment where his sister found him. He was able to walk with his sister back to their apartment and answered questions from his sister. The evidence did not establish that he was so intoxicated that he did not know what he was doing or that he did not know what he did was wrong. The accused had failed to prove the defence of intoxication on a balance of probabilities.

[37] In our view the learned judge assessment of the conduct of the accused

as to the extent of his intoxication was well supported by the evidence of PW5 who testified in examination-in-chief (at pp 58–59 of the appeal record *Jilid* I) as follows:

> Q Can you tell the court what you remember?
>
> A On that day I went to the end of block 18 near the hut and Abdul Mobin was waiting there. He was with another three friends at the hut. We seated there and have conversation. A few minutes later, about 30 youths came to the hut on their way back to their own house. I saw one of them wearing a green t-shirt and black long trousers and as he lifted his shirt I saw something tucked in at the waist of his trousers. They proceeded to the place where we were and three of Abdul Mobin's friends left the place leaving Abdul Mobin and myself.
>
> The person wearing the green t-shirt and long black trousers stood in front of us and he was in the state of drunk or confused. I heard someone saying 'if want to fight, just stab'. His friends try to calm him down and wanted to go back to their own house. Abdul Mobin followed the youths from behind. The group of youths took the outside route of the block while Abdul Mobin took the inner route of the block. He walk alone to the end of the block. I followed Abdul Mobin from behind. While I reached the middle of the block, Abdul Mobin had reached the end of the block and turning to another block and I did not see him again. But as I turned at the middle of the block I saw Abdul Mobin was chased by the group of youths who took the outside route of the block.
>
> Then I turned back to the middle block and I saw Abdul Mobin in front of me and was chased by someone to that block. Then I saw Abdul Mobin was stabbed. The youth who stabbed him then ran away. Abdul Mobin walked towards me and called my name and saying 'I was stabbed'. He stopped in front of my house. Then I shouted for help. After that his elder brother, his cousin, my father and a few people came and carried him to a car to be sent to hospital.

[38] When questioned further by the learned DPP in examination-in-chief PW5 identified the accused as the person wearing the green t-shirt that was in the group youths that were chasing the deceased (see pp 59–60 of the appeal record *Jilid* I) and also identified the accused as the person who stabbed the deceased (see p 65 of the appeal record *Jilid* I).

[39] We also noted that the Federal Court in a string of cases namely *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389; [2005] 2 AMR 750, *Public Prosecutor v Awang Raduan bin Awang Bol* [2006] 1 MLJ 332; [2005] 1 CLJ 649 and *Kenneth Fook Mun Lee v Public Prosecutor* [2007] 2 MLJ 130; [2006] 4 CLJ 359, and most recently in the case of *Kumaran a/l Sappani v Public Prosecutor* [2012] 6 MLJ 153; [2012] 6 MLRA 351, the Federal Court has stated that the general principle that can be extracted from these cases is that in

any event from the evidence of experts, the blood alcohol level itself can never be conclusive to determine the degree of intoxication of the accused for different people react differently to the same blood alcohol level. Furthermore, authorities have shown that the finding by the experts on any particular evidence is a question of fact. It is for the court to decide whether to accept the fact or not, having considered it in the light of other evidence available before it. This is trite law.

[40] In the circumstances, we agree with the finding and conclusion of the learned judge that the accused had on balance of probabilities failed to prove the defence of intoxication. We have carefully scrutinised the learned judge analysis of the evidence on this issue and we find no fault in the learned judge evaluation of the evidence in respect of this defence and we find no fault in his reasoning to merit our intervention.

[41] We will now discuss the first and third ground of appeal in this appeal. With regard to the first ground that the evidence that it was the accused who stabbed the deceased is only circumstantial, the primary evidence is the testimony of PW5. Having scrutinised his testimony as found in the notes of proceedings in the appeal records, we are of the view that evidence of PW5 is not circumstantial. In fact his evidence is that of an eye-witness. From the testimony of PW5 (at p 58 of the appeal record *Jilid* 1) it appears that after the initial encounter with the accused at the hut near Block 18 apartments, the accused and his group of friends walked back to their own apartments followed by the deceased and PW5. He then testified that he saw the accused chasing the deceased. PW5 further testified that he saw the deceased stopped (from running) and turned back facing the accused who was chasing him. PW5 then testified he saw the accused moved and looked like the accused was punching the deceased at the chest, then the accused ran away.

[42] The prosecution had also adduced evidence through PW3 that the knife (exh P14) which was the suspected weapon used in the stabbing of the deceased was recovered from the accused's apartment on the same day when the accused was arrested by PW3. That was the next day after the incident exh P14 was found by the chemist PW8 to have human blood stain and it was sent for DNA analysis together with a sample of the deceased's blood. The DNA analysis was done by PW14 the scientific officer attached to Jabatan Kimia Kuching, and PW14 had prepared her report on her DNA analysis and the report was tendered as exh P45. In her report exh P45, PW14 has stated that the DNA profile developed from the blood stain found on the blade of the knife P14 matched the DNA profile developed from the blood sample taken from the deceased which indicated that the DNA identified originated from the same source. In the face of this evidence it is without doubt that P14, the knife recovered from the accused's apartment was used to stabbed the deceased.

What could be circumstantial, in our view, is the fact that PW5 did not actually see the blade of the knife P1 being thrust into the deceased's chest by the accused. However it must be noted that PW5 testified that when he saw the accused moving like he (the accused) was punching the deceased and then ran away, PW5 was about 60 feet away from the deceased; and then the deceased walked towards PW5 by calling PW5's name and said he was stabbed before the deceased collapsed in front of PW5's house and taken to hospital. On this part of the testimony of PW5 the learned judge has said in para 17 of his judgment (at p 226 of the appeal record *Jilid* II) as follows:

> 17. The evidence established that at the material times, i.e. from the time when the deceased ran back to the corridor inside Block 18, to when the accused approached the deceased as if to punch the deceased in the chest, to when the accused ran away and the deceased turned and walked towards PW5 who saw there was bloodstain on the deceased's shirt, to when the deceased told PW5 that he had been stabbed, only the three of them were present at the scene of the incident. These were the accused, the deceased and PW5. There was no other person present who was or could be involved in the punching or stabbing of the deceased at the corridor inside Block 18. There was no other person present who could have interrupted or break this chain of events. These series of events at the material times were so closely connected and related to each other that they pointed to the one and only conclusion, that it was the accused who stabbed the deceased in the chest.

[43] The law as to the acceptance of circumstantial evidence is well settled in that the cumulative effect of such evidence must lead to irresistible conclusion that it was the accused who committed the crime: (see *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195; *Mohd Abbas bin Danus Baksan v Public Prosecutor* [2006] 5 MLJ 332; [2006] 3 CLJ 880 (CA)). Similarly in this case if we were to accede to the accused's arguments that the evidence of the stabbing is only circumstantial, we are of the view that cumulative effect of the circumstantial evidence in this case points exclusively to the accused as the perpetrator of the crime complained of. The mere fact that PW5 did see the blade of the knife being thrust into the chest of the deceased does not create any reasonable in the prosecution case as to the identity of the accused as the person who did the stabbing of the deceased. Accordingly we find no merit in this ground of appeal by the accused.

[44] As to the third ground of appeal we are of the view that the accused is even on a weaker ground. Learned counsel for the accused contended that there is no corroboration to the testimony of PW5 who said he only saw the accused as if the accused was punching the deceased but did not see the accused stabbing the deceased with a knife or a weapon. In our view there is no necessity for any corroboration. In this case there is no allegation that PW5 is an interested witness; and we find that he is not. PW5 also is neither an accomplice nor an accessory after the facts whose evidence would require

independent corroboration. The law is very clear that even the evidence of an interested witness may be accepted and given due weight provided it passes the test and assessment in accordance with the principle outlined in *Balasingam v Public Prosecutor* [1959] 1 MLJ 193. This principle was approved by the Federal Court in *Kumaran a/l Sappani v Public Prosecutor* [2012] 6 MLJ 153; [2012] 6 MLRA 351. On the same issue, and in the same case, the Court of Appeal (*Kumaran a/l Sappani v Public Prosecutor* [2010] 2 MLJ 771; [2012] 6 MLRA 390) had said [at held (2)] that:

> (2) Ujian sebenar untuk menerima atau menolak keterangan seseorang saksi ialah bagaimana konsistennya keterangan saksi itu dengan sendirinya, bagaimana tahannya keterangan itu dalam proses pemeriksaan balas dan sejauh mana keterangan saksi itu sesuai dan konsisten dengan keterangan-keterangan lain serta keadaan kes tersebut. Tergugat atau tidaknya keterangan seorang saksi itu dalam pemeriksaan balas bukanlah ujian muktamad yang semestinya menjadi penentu kepada kebolehpercayaan. Kebarangkalian semula jadi (inherent probability) atau sebaliknya sesuatu fakta yang menjadi isu mestilah menjadi pertimbangan utama.

[45] Moreover in *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257, the Federal Court had said that the appellate court should not lightly differ from the views of the trial judge since he had the advantage of seeing and hearing the witness whose demeanor he was able to study in order to form his opinion as to their credibility.

[46] Therefore we are of the view that there is no good reason to reject the testimony of PW5 and that the learned judge had correctly made a proper judicial appreciation of PW5 evidence.

[47] As to sentence, we are of the view that it is appropriate in the circumstances of the case and we do not propose to interfere with it.

[48] Accordingly this appeal is dismissed and the conviction and sentence imposed by High Court is hereby affirmed.

Appeal dismissed and conviction and sentence imposed by High Court affirmed.

Reported by Kohila Nesan